No. 15,131

IN THE

United States Court of Appeals

For the Ninth Circuit

[illegible] STEAMSHIP COMPANY, a corporation	*Appellant,*
vs.	
[illegible] STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE [illegible]MPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY [illegible] THE DOMINION OF CANADA,	*Appellees.*
[illegible]NTIC MUTUAL INSURANCE COMPANY,	*Appellant,*
vs.	
[illegible]S STEAMSHIP COMPANY, a corporation, UNITED STATES [illegible]MERICA and THE DOMINION OF CANADA,	*Appellees.*
[illegible]IFIC NATIONAL FIRE INSURANCE COMPANY,	*Appellant,*
vs.	
[illegible]TES STEAMSHIP COMPANY, a corporation, UNITED STATES [illegible]AMERICA and THE DOMINION OF CANADA,	*Appellees.*
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[illegible] DOMINION OF CANADA,	*Appellant,*
vs.	
[illegible]S STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE [illegible]MPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY [illegible] THE UNITED STATES OF AMERICA,	*Appellees.*

Appeals from the United States District Court for the District of Oregon.

BRIEF OF APPELLANT UNITED STATES OF AMERICA.

[illegible]E COCHRAN DOUB,
A[illegible]tant Attorney General,
[illegible]. LUCKEY,
[illegible]ited States Attorney,
[illegible]VENWORTH COLBY,
[illegible] R. FERGUSON,
[illegible]ttorneys, Admiralty and Shipping Section,
[illegible]epartment of Justice,
Attorneys for Appellant United States of America.

[illegible]NNETH E. KULZICK,
Of Counsel.

[illegible]-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF OF APPELLANT UNITED STATES OF AMERICA.[1]

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[1]Appellant United States shall hereafter be referred to as the Government", the States Steamship Company as "Petitioner" d all other appellants and appellees as "other claimants" in view the large number of appellants and appellees herein. References pages of the record will be prefaced by a capital "R" followed the page number.

JURISDICTION.

Jurisdiction of the District Court in this Admiralty Cause rests upon Rules 51 to 55 of the United States Supreme Court Admiralty Rules,[2] by reason of a petition (R.3) filed by States Steamship Company, a corporation, appellant and appellee herein, for exoneration from or limitation of liability from all claims (Government, R.11, and other claims, R.25, R.43, R.61) arising out of the sinking of the SS PENNSYLVANIA, formerly the LUXEMBOURG VICTORY, on January 9, 1952, four days after her departure from Seattle, Washington, in the Gulf of Alaska. The radiograms from the PENNSYLVANIA describe her imminent sinking by reason of a crack down the port side between Frames 93 and 94 starting in the sheer strake and running down 14-feet, allowing sea water to enter the engine room through the crack and also sustaining a failure or breakdown of the steering system and being for a time unable to steer by any method in heavy seas, the taking of water in the No. 1 hold and the deck cargo coming adrift, taking off the tarpaulins on the forward hatches and the No. 2 hatch being open and full of water, the vessel down by the head, resulting in the sinking and total loss of the vessel, all of her crew, all personnel, and all cargo aboard. By its findings of facts and conclusions of law (R.72) and its interlocutory decree (R.78) Petitioner States Steamship Company, was by the lower Court denied exoneration from liability for failure to use due dili

[2]See *Morrison v. District Court of Southern District of New York*, 147 U.S. 14, 37 L.ed. 60 (1893).

gence to make the vessel seaworthy (R.78) and granted limitation of liability to the value of the freight pending at the time of the vessel's loss.

The Petitioner and all cargo claimants [the death claims having been compromised, settled and dismissed (R.73, R.93)] have appealed from parts of the interlocutory decree, the Petitioner appealing from that part of the interlocutory decree denying exoneration from liability and the cargo claimants appealing from that part of the interlocutory decree granting limitation of liability to the amount of the freight pending, so that all the parties to the action are both appellants and appellees before this Court.

This Court's jurisdiction of the Appeal of the Government rests upon 28 U.S.C. 1292(3) by reason of the Notice of Appeal (R.83) filed February 23, 1956, from all that part of the interlocutory decree (R.78) dated February 10, 1956 and entered on February 16, 1956, which orders, adjudges and decrees that the petition for limitation of liability to the amount of the pending freight on the SS PENNSYLVANIA be allowed or granted and from every part of said interlocutory decree which orders, adjudges and decrees that the petition of said States Steamship Company for limitation of liability is allowed or granted.

STATEMENT OF THE CASE.

The District Court, having filed its Memorandum Opinion (R.71), called for a hearing on the settlement of Findings of Fact and Conclusions of Law at which

hearing the District Court refused to adhere to its Memorandum Opinion (R. 71) [See the *Kiska-Mayflower,* (9th Cir.), 205 F. 2d 262, 1953 A.M.C. 1021], and after full argument of all counsel of all the parties, the District Court entered the following (R.72):

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.[3]

"The above-entitled cause coming on for trial commencing on the 13th day of July, 1954, upon the petition of States Steamship Company, under the provisions of Sections 183 et seq. of Title 46, United States Code, for exoneration from or limitation of liability from all claims arising out of the sinking of the SS PENNSYLVANIA, formerly the LUXEMBOURG VICTORY, on January 9, 1952, with the total loss of the vessel, all of her crew and personnel aboard and all of her cargo, and it appearing to the Court that prior to the time of trial default had been duly entered of all persons having claims arising out of said disaster except those who had filed claims herein, and it further appearing that all claims for death of the crew and personnel aboard on file here had been settled out of court, the trial proceeded upon the sole remaining issues presented by the petition and the claims for loss of cargo, * * *[4] and evidence both oral and documentary having been introduced, and the petition and all claims in this cause remaining for decision being sub-

[3]Reported 1956 A.M.C., page 1810.

[4]The portions left out as indicated by * * * relate only to the appearances of the parties and their attorneys.

mitted, the Court now, after due deliberation thereon and consideration of extensive arguments and briefs of counsel, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I.

That petitioner, States Steamship Company, in February 1951, purchased from the United States of America the SS PENNSYLVANIA, formerly the LUXEMBOURG VICTORY, a Victory-type vessel, Official Number 245,327, built for the Government by the Oregon Shipyard and completed on April 5, 1944, with dimensions of 455 feet, 3-11/32 inches in length, with beam of 62.1 feet, and gross tonnage of 7,608 tons.

II.

That on January 5, 1952, the petitioner, as the owner and operator of the SS PENNSYLVANIA, sailed said vessel (designated as Voyage VI), from the Port of Seattle for the Port of Yokohama via the Great Circle Route, as a common carrier for hire, having on board the cargo of the claimants which the vessel had received in good order and condition, and that during the course of said voyage the SS PENNSYLVANIA sank during a storm in the Gulf of Alaska at a position of approximately 505 miles WNW of Seattle, Washington, and 535 miles SE of Kodiak, Alaska, with a total loss of the vessel, all of her crew and personnel and the total loss of all her cargo, including all the cargo of the claimants.

III.

The storm, which has been designated as Pennsylvania storm, in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle Route, and there was nothing catastrophic about the storm as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the PENNSYLVANIA being her own unseaworthiness.

IV.

The contributory factors responsible for the sinking of the SS PENNSYLVANIA are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steering systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that the No. 2 hatch was open and full of water.

V.

That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo.

VI.

That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability.

VII.

That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the petition and the claims of cargo interests under Rules 51 to 55 of the United States Supreme Court Admiralty Rules.

II.

That the petitioner has failed to prove due diligence to make the SS PENNSYLVANIA seaworthy at the inception of the voyage upon which she sank by reason of her unseaworthiness and is not entitled to exoneration from liability to the cargo claimants.

III.

That the petitioner has proved that the unseaworthiness of the SS PENNSYLVANIA at the inception of her voyage was without the knowledge or privity of the petitioner and is entitled to limited liability to the value of the freight pending, which amount is set forth in the order of this Court, dated May 26, 1954.

IV.

That the cargo interests are entitled to judgment against the petitioner for the amount of the pending freight in ratio to the amount of their respective claims, with interest at 6% together with their costs.

Let an interlocutory decree enter accordingly and if the parties cannot agree between themselves as to the damages and segregation thereof, the matter shall be referred to a commissioner to be appointed by the Court who shall ascertain the amount thereof and

nake report to the Court in accord with the agreement of the parties made at the commencement of the trial."

The Court having, by its Findings of Facts and Conclusions of Law, found that the vessel was unseaworthy at the inception of its voyage, that the petitioner did not use due diligence required by law to make the vessel seaworthy so as to entitle it to exoneration from liability, and that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner, entered its interlocutory decree (R.78) in which it was decreed that the petition for exoneration from liability be denied and that the petition for limitation of liability to the amount of the pending freight on the SS PENNSYLVANIA on January 9, 1955, the date of her sinking and the end of her voyage, be granted.

STATUTE.

The pertinent provisions of the statute involved on this appeal are as follows:

The Limitation of Liability Act,

Sec. 183 of Title 46, U.S.C., provides as follows:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in

the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

SPECIFICATIONS OF ERRORS RELIED UPON BY APPELLANT UNITED STATES OF AMERICA.

The appellant United States of America relies upon the following specifications of error which it intends to urge on appeal herein:

Specification I.

The District Court erred in finding and holding as a matter of fact and concluding as a matter of law, that the petition for limitation of liability to the amount of the pending freight on the SS PENNSYLVANIA at the end of her voyage be granted and allowed (Statement of Points, I and V), and in failing to find and conclude that the Government was entitled to recover the full value of its cargo and to enter judgment in its favor therefor. (Statement of Point X).

Specification II.

The District Court erred in finding, holding and concluding that the evidence is sufficient to show that the unseaworthy condition of the PENNSYLVANIA at the inception of her voyage was without the privity and knowledge of the petitioner and in failing to find that the said condition was within the privity and knowledge of petitioner. (Statement of Points, II, III, IV and V).

Specification III.

The District Court erred in failing to find and conclude that the petitioner had failed to sustain the burden of proving that the cause of the sinking of the PENNSYLVANIA and the resultant loss of the Government's cargo was without the privity and knowledge of the petitioner. (Statement of Point IX).

Specification IV.

The District Court erred in failing to find that petitioner had failed to prove that the unseaworthiness of the PENNSYLVANIA, including her many faults, defects and crack-sensitiveness, were not within the privity and knowledge of petitioner through its Marine Superintendent Lester A. Vallet, and in failing to find that petitioner had fully delegated the duty to make said vessel seaworthy to its said Marine Superintendent who had knowledge and privity of its unseaworthy condition at the commencement of its voyage. (Statement of Points, VI and VII).

Specification V.

The District Court erred in failing to find and conclude that the petitioner, in sailing the PENNSYLVANIA via the Great Circle Route, knew of its unseaworthiness, including the crack-sensitiveness of the vessel to the cold waters of the Gulf of Alaska where the vessel sank, and in failing to find and conclude that the petitioner knew that the PENNSYLVANIA was not fit to meet the perils expected on her fatal voyage. (Statement of Point VIII).

STATEMENT OF FACTS.

The lower Court found (Finding III, R. 75) that "the sole and proximate cause of the sinking of the PENNSYLVANIA" on January 9, 1952, with the loss of her entire crew and cargo was her own unseaworthiness at the inception of the final voyage (Finding V, R. 76, Designated Voyage VI) and that the contributory factors of this unseaworthiness (Finding IV, R. 75) were that the vessel sustained a crack between Frames 93 and 94 running down about 14 feet, sea water entering the engine room through this crack, the failure or breakdown of its steering system, the vessel for a time being completely unable to steer by any method in heavy seas then existing, the taking of water in the No. 1 hold, the cargo adrift on the forward deck, taking off tarpaulins on the forward hatches and the No. 2 hatch being open and full of water. The many "faults, failures, breakdowns and defects set forth in the preceding Finding IV, together with the crack-sensitiveness of the vessel to extreme cold weather, by reason of a former 22 foot crack in her deck occurring on her previous Voyage V which crack was fully repaired were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately causing her sinking." (Finding V. R. 75, 76).

Many of the "faults, failures, breakdowns and defects" which were the immediate causes of this, one of the greatest marine disasters in the Pacific, are

graphically set forth in the dying words of the Captain of the ship sent just prior to the time the vessel sank as relayed by the wireless messages, directly, and indirectly through other ships, to the Coast Guard. These messages point the accusing finger against Petitioner and its Marine Superintendent Vallet, of high negligence, privity and fault which sentenced the ship, Master and crew to their cold and icy grave in the Gulf of Alaska, which prevents the Petitioner from limiting its liability herein as it did in *The IOWA,* (D. Ore.), 34 F. Supp. 843, 1938 A.M.C. 615, in which latter case there was no evidence from the ship showing the unseaworthy causes of sinking. These messages, all dated January 9, 1952, were introduced in evidence as Exhibits 127 and 128, the pertinent portions of which are as follows:

"FROM SS PENNSYLVANIA
TO (CCGD THIRTEEN)
JAN 9 1952 0643
1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST CRACK DOWN SIDE OF VESSEL DECK HALFWAY DOWN ENGINE ROOM PORT SIDE WIND WNW 9 VERY HIGH WESTERLY SEA VESSELS IN VICINITY PSE QRX AND QSL DE KWCT AR' "

'FROM SS PENNSYLVANIA
TO (CCGD THIRTEEN)
JAN 9 1952 0729
1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST HULL CRACKED 14 FEET

DOWN PORT SIDE INTO ENGINE ROOM VESSEL TAKING WATER BUT CAN HANDLE WITH PUMPS IF SITUATION DOES NOT BECOME WORSE VESSELS IN VICINITY PSE KEEP CLOSE WATCH BT DE KWCT' "

"FROM SS PENNSYLVANIA

TO (CCGD THIRTEEN)

JAN 9 1952 1007

'091730ZGMT 51.09 N 141.31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM' "

"FROM SS PENNSYLVANIA

SEATTLE RADIO/KLB VIA MACKAY

63 JANUARY 9 1130AM 1952

STATESLINE PORTLANDORG

'1905 GMT TAKING WATER NUMBER ONE HOLD DOWN BY HEAD CANNOT STEER OR GET FORWARD TO SEE WHERE TROUBLE IS PUMPS HOLDING IN ENGINE ROOM. IF WE CAN NOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE. VERY HIGH SEAS. CAN NOT GET ON DECK AT PRESENT. DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES. CAN NOT GET ON DECK TO SECURE

MASTER' "

"FROM COGARD RADST PT HIGGINS
TO CCGD THIRTEEN
JAN 9 1952 1213
'FOLLOWING RECD ON 500KCS QUOTE SOS SOS SOS DE KWCT KWCT KWCT BT SS PENNSYLVANIA AT 1920 LAT 51.09 N 141.13 W RPT 51.09 N 141.13 W TAKING WATER IN ENGINE ROOM AND NR 1 HOLD DOWN BY HEAD REQUIRE AID AR DE KWCT HW UNQUOTE' "

"FROM OS NAN TO COMWESTAREA COGARD

FROM COMWESTAREA COGARD
TO CCGD THIRTEEN
JAN 9 1952 1341
'FOLLOWING RECEIVED ON 500 KCS at 1956Z QUOTE KWCT DE KTOG POSN 49.10N 142.35W HAVE HIGH SEAS DID YOU GET ASSISTANCE YET AND WHAT YOU NEED/NOT YET BUT HOLD ON PUMPING ALL OIL FM— WEATHER STILL PRETTY — UNQUOTE AT 2015Z SUGAR OBOE SUGAR DE KWCT BT PENNSYLVANIA 1920 GMT PSN 51.09N 141.13W TAKING WATER IN ENGINE ROOM AND NR 1 HOLD TARPS FWD HATCHES STILL HOLDING USING HAND STEERING NEED ASSISTANCE AR DE KWCT UNQUOTE — KWCT DE NMJ R R SUGAR OBOE SUGAR AR UNQUOTE AT 2021Z QUOTE FM SS CYGNET IS OUR ASSISTANCE NEEDED PLEASE GIVE PLENTY TIME DUE TO SEAS WE ESTIMATE 24 HOURS FROM YOUR POSN PLEASE ADVISE BT MAS-

TER AT 2024 UNKNOWN STATION SENDING VVV DE NMC QRT — BT K' "

As there were no survivors, and not even a lifeboat or any wreckage sighted, the radiograms from the vessel are the only direct evidence of what the vessel, her valiant master and crew, were going through and the causes of her sinking. The evidence clearly supports the Court's finding that the PENNSYLVANIA storm "was not of such magnitude as to constitute a peril of the sea, the weather encountered if not actually anticipated certainly was of a kind reasonably to have been expected on Trans-Pacific voyages on the Great Circle route" and that "the sole and proximate cause of the sinking of the PENNSYLVANIA" four days after her departure from Seattle, Washington, was "her own unseaworthiness". *The SOUTHERN SWORD,* (3rd Cir.) 190 F.2d 394, 1951 AMC 1518; *The PLOW CITY,* (3rd Cir.) 122 F.2d 816, 1941 AMC 1564, cert. denied 315 U.S. 798.

The past history of the PENNSYLVANIA warned of and clearly indicated to Petitioners Marine Superintendent Lester A. Vallet the faults and defects of the vessel ultimately causing her loss. The admitted facts as well as the testimony of the witnesses show that petitioner through its Marine Superintendent, who was the alter ego of the petitioner in charge of manning and operating the vessels and making all inspections and repairs (R.2624), had full reports of the history and physical condition of the PENNSYLVANIA (ex-LUXEMBOURG VICTORY) from the time she was launched until the commencement of her

fatal Voyage No. VI from the Port of Seattle on January 5, 1952. This history shows that the vessel was built in April 1944, and on her first voyage in that year ran on a reef in the Fiji Islands while empty with no ballast and while traveling at a speed of 13 or 14 knots (R. 2221), the vessel sustained considerable bottom damage in this incident, which was subsequently surveyed and repaired at San Francisco (Exhibit 147). Between 1944 and January 1951, while the vessel was owned by the Government, she sustained numerous incidents of severe and extensive damage to her hull and frames due to heavy weather, collisions, etc., including a 3-foot fracture on the forecastle head in 1947 (R.2361). Some of these repairs were made by fairing the old material in place, some were made by complete replacement of damaged plates and others were made by partial replacement of damaged plates (Exhibit 147 and R. 2390 through 2430, 2438 through 2455, 2583 through 2585.) In a report of May 6, 1948, it was noted that the bottom plating of the vessel from No. 2 to No. 5 double bottoms was wavy with deepest distortions ¾″ and average distortion ¼″ (Exhibit 147). Nothing was ever done to repair or counteract this wavy bottom condition (R. 2401). In January 1949, a small amount of hogging in the vessel's bottom was noted by an American Bureau of Shipping surveyor (Exhibit 147). In December 1950 and January 1951, representatives of the Petitioner made an examination and survey of the ship with a view to purchasing the vessel from the Government (R. 140 through 147) and by Bill of Sale effective February 17, 1951, the vessel was sold by the Government to the States

Steamship Company *without warranty* (Exhibit 3), the petitioner giving to the Government a preferred mortgage to secure an indebtedness of $754,000.00 (R. 249) on the purchase price of approximately $1,000,000.00. At the time of sale in February, 1951, cracks under padeyes in the deck plating in the vicinity of Nos. 2, 3, 4 and 5 hatches indicating heavy stresses upon the deck were repaired to make the vessel seaworthy. (R.638, 445). These stresses are explained by Mr. Hechtman (R.2368, 2369-2371).

Immediately after purchasing the vessel, States Steamship Company had certain alterations carried out, including conversion of the deep fuel oil tanks in No. 4 cargo hold, over objections by the Maritime Commissions as mortgagee of the vessel. The Commission warned by letter of February 7, 1951 (R. 252): "Elimination of these trunks would definitely jeopardize the vessel in case of damage in the way of these tanks when carrying dry cargo or empty where large permanent lists should be incurred with possible eventual loss of the vessel." Marine Superintendent Vallet did not agree with Maritime on the ground that "we met all the requirements of the Coast Guard and the American Bureau of Shipping. They did not require it." This alteration included the cutting of hatch openings in the deep tanks approximately 16 feet long and 8 to 10 feet wide (R. 436). Prior to its fatal voyage, the ship, while owned by States Steamship Company made five voyages across the Pacific and back. On the 6th, 7th and 8th of August, 1951, annual inspection was had but the main steering engines were only tested

by operation from the wheelhouse and observed from the engine room, and they were not opened up for inspection, Mr. Vallet being present in charge during the whole annual inspection (R. 170), and no evidence was introduced showing any inspection of any padeyes for fractures and they were not in fact inspected.

On October 27, 1951, the SS PENNSYLVANIA sailed, for the commencement of its Voyage V, from Long Beach, California, bound for the Orient (Exhibit 69). On November 2, 1951, while proceeding in heavy weather with a fairly high temperature of 54°, the vessel sustained a 22-foot crack, designated as a Class 1 casualty, in the main deck on the starboard side just forward of the midship house (Exhibit 44). On being advised of this crack by radio, the States Steamship Company *"suggested"* to the Master by radio that he return to the closest and safest port and the Master then proceeded into Portland, Oregon (R. 161), which is the head office of the States Steamship Company, so far as operations go, (R. 292). Mr. Lester Vallet, the Marine Superintendent, attended aboard the vessel on arrival, and surveyed the damage and prepared specifications for the repairs (R. 163). The 22-foot crack was also inspected by the American Bureau of Shipping and the Coast Guard and the repairs were carried out by the Albina Engine & Machine Works (R. 162). The vessel was not drydocked at this time and only so much of the cargo was unloaded from the No. 3 'tween deck and from the deck of the vessel around No. 3 hatch as was necessary to inspect and repair the 22-foot deck crack and other damages in that immediate

area (R. 235 and 281). Even with the history of the three foot crack on the forecastle head occurring in 1947 (R. 2361, ABS Report 1099), and cracks around padeyes in vicinity of Nos. 2, 3 (R. 617, 638), 4 and 5 (R. 445) hatches found and noted in Coast Guard Reports in February, 1951, which were required to be repaired before the vessel could be declared seaworthy (R. 645, 648), no tests of or inspection of padeyes on the deck portions of the vessel other than those in the immediate area of this 22-foot crack, a Class 1 Casualty, were made by the Petitioner at this or any other time, although it was known that cargo would be secured to such other padeyes, and heavy trucks, trailers and the acid crib were thereafter actually lashed to padeyes on the deck on the fateful Voyage VI (R. 1028, 1064, 1084). The American Bureau of Shipping surveyor confined his examination to the immediate area of the 22-foot crack (R. 912). A survey was also made by a Mr. Kenneth Webb on behalf of Lloyd's. His examination also was confined to the immediate area of the crack, although he would have examined the interior of all the holds of the vessel for other damage if the vessel had been unloaded (R. 1127 and 1128). Mr. Vallet, Petitioners alter ego, in drawing the specifications for the repairs, did not inspect padeyes on other parts of the ship although he knew of previous cracks therein.

The 22-foot deck fracture in the vessel was classified as a Class 1 casualty by the Ship Structure Committee (Exhibit 189). It was determined that the 22-foot crack started at a padeye location on the starboard

side of the deck of the vessel (R. 167). A study and examination of a sample of this deck steel by the Bureau of Standards revealed that the major crack spread from a small crack at the padeye in the deck which was older and had existed in the deck for a considerable period of time as evidenced by the scaly rust (Exhibit 136 and R. 1885 and R. 1886).

At the time the vessel cracked on Voyage V, the air temperature was 54° (Exhibit 44) which is considered a high temperature for a fracture to occur (R. 2773). It gave both positive and constructive notice and warning to the petitioner, through its Marine Superintendent, Mr. Vallet, that this vessel "was notch sensitive which means that if a notch or abrupt discontinuity is present in the steel and the steel is below its critical temperature, it will fracture beginning in the area of the notch, with the application of far less energy than would normally be required." The *ESSO MANHATTAN* (S.D. N.Y.) 121 F. Supp. 770, 1953 A.M.C. 1152. Mr. Vallet was familiar with the Reports of the Ship Structure Committee under date of June 15, 1946 so pointedly referred to in the *ESSO MANHATTAN supra* and should have heeded the warning of the crack sensitiveness of the SS PENNSYLVANIA given by the previous fractures around padeyes near the 2, 3, 4 and 5 hatches and the 22-foot crack, and the previous 3-foot crack on the forecastle head. There was no survey or inspection made of any of the padeyes on the deck of the vessel at the time of inspection of this No. 1 Casualty other than the 22-foot crack except the one padeye on the port side which Mr. Vallet, the Marine

Superintendent, discovered and had removed because a crack had started therein. (R. 167)

While the vessel was in Portland for these repairs on Voyage V, it was discovered by a crew member of the vessel that the emergency steering gear was not working properly (R. 344). The ensuing investigation by Marine Superintendent Vallet indicated that cargo in the No. 5 hold in the nature of Army blankets and clothes had entered in around the shaft and wrapped around it so as to make it difficult to turn. The shaft was freed up by removing this clothing (R. 169 and 217) but no measures were taken to prevent a recurrence (R. 372) of trouble with the emergency steering gear, although this same hold No. 5 was loaded full of cargo on the fateful Voyage VI. What, if any, tests were made of the hand steering gear which operates the telemotor by hand was not shown although the radiograms and findings of the Court show that "for a time the vessel was completely unable to steer".

The vessel sailed from Portland on November 14, 1951, and continued its Voyage V to the Orient and returned to Seattle, Washington. During the return voyage from the Orient the fourth assistant engineer of the vessel detected a 2-foot crack in an angle bar where the bulwark fastened to the midship house on the port side at the after end of the house (R. 2663). This crack was never repaired and petitioner has not accounted for its failure to do so.

The vessel went on drydock at Todd's Shipyard in Seattle on December 21, 1951, at 1912 hours (Exhibit 44). The Marine Superintendent and Port Engineer

of the company, Mr. Vallet, did not go to Seattle for this drydocking (R. 178), but sent his assistant port engineer, Mr. Brenneke (R. 331). Since Mr. Brenneke was fully empowered to take Mr. Vallet's place and perform his duties in Mr. Vallet's absence (R. 241), Mr. Brenneke had the full authority of Lester Vallet, the Marine Superintendent, in the premises (R. 2623, 2624) and thus had charge of this part of the petitioner's business during the drydocking period. The knowledge and privity of Mr. Brenneke was the knowledge and privity of petitioner. Mr. Brenneke's examination and survey of the vessel was limited to the underwater portions of the vessel (R. 1718 and 1719) even though advised by Mr. Vallet to make a thorough examination (R. 271 and 272). The vessel had carried cargo back from the Orient to Seattle on the return trip of Voyage V (R. 2102) and since the vessel was discharging cargo on December 23, 1951 (R. 1161 and Exhibit 44) the day after the vessel came off the drydock, it is clear that the vessel still had cargo aboard her while she was on drydock.

While the vessel was on drydock, examination and surveys of the underwater body were conducted by the Coast Guard and the American Bureau of Shipping. Neither the Coast Guard representatives (R. 685) nor the American Bureau of Shipping surveyor (R. 769) received any special information or reports of anything unusual about the vessel including the 22-foot crack on Voyage V, either before or during their drydock examination, nor did they make any inspection on deck of the padeyes or below deck for cracks, nor

was there any evidence of inspection of any of the steering engines which failed to operate just before the vessel sank. In fact there was no full examination of either the main or hand steering gear by opening them up at any time. The vessel came off drydock at 1650 hours on 22 December 1951. Some general cargo was discharged and some steel plates were shifted in the vessel on 23 December 1951 (R. 1161 and 1162 and Exhibit 44). On December 27, 1951, the vessel arrived at Vancouver, British Columbia (R. 962). The lower holds of the vessel were prepared for the receipt of bulk grain and these preparations included sealing off of the bilge strainers in the lower holds with two layers of burlap (See deposition of the Grain Foreman, Neil McIver, Exhibit 186, R. 2637-2640, R. 2654). After completing the loading of the grain cargo the vessel departed from Vancouver on January 2, 1952, and proceeded back to Seattle, Washington (Exhibit 44).

The vessel arrived at Seattle on January 2, 1952, and docked at the Pier 37 to load Army cargo (R. 1165). At some time prior to the vessel's arrival at Seattle, the States Steamship Company had tendered certain space on the PENNSYLVANIA to the Army for carriage of their cargo on that voyage (R. 2775). The space offered by the States Steamship Company included the entire deck space of the vessel (R. 2130). On the basis of the space offered and cargo which the Army had available, the Army had made up a pre-stowage plan (R. 2118). The Army pre-stowage plan indicated that the label corrosive acid was to be stowed

on deck in the wings of No. 5 hatch, extending up about one-third of No. 4 hatch and that the five gallon carboys should be stowed one level high and that red label acetylene should be stowed under deck (R. 2120, 2121 and 2128).

The Government cargo was loaded aboard the PENNSYLVANIA between January 2 and January 4, 1952, by an independent contractor (R. 1068). Under the terms of the contract between the States Steamship Company and the Government, all loading and stowage was under the supervision of the Master (Exhibit 133, Article 5(g)). During the course of the loading of the vessel, the Master intervened and designated specifically that the corrosive acid should be stowed on the forward deck alongside No. 2 hatch rather than on the after deck alongside No. 5 hatch (R. 2687) although the No. 2 hatch would receive constant heavy sea water in storms to be expected on the Great Circle Route while the preferred location for stowage of such acid cargo would be on the after deck near No. 5 hatch which was a more sheltered position and would not be subject too much to the storms (R. 2433, 2434, 2220 and 2705). The acid cargo was stowed two tiers high (instead of one high as requested by the Army) alongside the No. 2 hatch (R. 1004). The acid cargo was stowed in a crib, the chain over the top being shackled to deck padeyes, and tightened by turnbuckles (R. 1040, 1081). This brought the height of that stowage up to between five and six feet (R. 992 and 1039). The acetylene was also stowed on the forward deck (R. 1095-1096).

All holds of the vessel were completely filled with cargo, including the No. 5 hold which was stowed tight with cargo right up to the overhead (R. 1074 and 1746). At all times during the loading of the Government cargo, the States Steamship Company had aboard the vessel a shore based supercargo who was in charge of the loading of the vessel for States Steamship Company (R. 1156). The stowing of the corrosive acid on the forward deck was done sometime during the day on January 4, 1952, (R. 1110 and Exhibit 86). The supercargo reported the stowage of the acid cargo in that location to the States Steamship Company's Seattle office on the day that it was so stowed (R. 1166 and 1167) and the improper stowage was therefore brought directly to the notice of petitioner who became privy to such improper stowage. In fact, the Marine Superintendent, Mr. Vallet, testified (R. 284):

"A. When the vessel is *loaded and properly stowed and bunkered we advise the Master to that effect* and we leave it up to him when he should leave." (Italics supplied.).

The vessel completed loading on the morning of January 5, 1952, and cast off from Pier 37 shortly after 0800 on January 5 (R. 739). In addition to the boxes of corrosive acid carried as deck cargo, the vessel carried on the forward deck 26 two-wheel trailers (Exhibit 188). These trailers were stowed on the starboard side alongside No. 3 hatch (R. 1005). There were also two seven-ton carryall trucks stowed one on the starboard side of No. 4 hatch and one on top of the

No. 4 hatch (R. 1013, 1014) and their lashings were also secured to deck padeyes (R. 1050, 1051).

Crew members of the PENNSYLVANIA on Voyage V testified that the cross battens which were used to secure the forward hatches of the vessel were in a bent condition so that they were difficult to secure and keep secured (R. 2082, 2094, 2100 and 2101).

At the time the PENNSYLVANIA sailed on January 5, 1952, forecasts available from the United States Weather Bureau indicated that storms with winds of force 7 to 9 were prevailing in the Gulf of Alaska in the vicinity of Ocean Station Peter (Exhibit 176, identified R. 2267), which forecasts were available to the public including Petitioner's officers and its alter ego, Mr. Vallet. The States Steamship Company had no facilities in their shoreside offices to receive weather forecasts and were not interested therein, Mr. Vallet, the Marine Superintendent, testifying (R. 283):

"Q. Your office is not interested in weather forecasts?

"A. No."

and further on page 284:

"A. When the vessel is loaded and *properly stowed* and bunkered we advise the Master to that effect and we *leave it up to him when he should leave.*

"Q. *Even though there is a hurricane existing* at the time.

"A. Yes." (Italics supplied).

The only evidence as to weather actually encountered by the PENNSYLVANIA is contained in the

radio messages (Exhibit 127) which report winds of Beaufort force 9, with very high seas, (which is not considered unusual in the North Pacific in January, R. 2582).

Other reports of weather conditions in areas distant from the PENNSYLVANIA are therefore to be disregarded in favor of the weather conditions reported directly by the PENNSYLVANIA. There were approximately 17 ships reporting weather conditions from the general storm area on January 8 through 10, 1952 (R. 1594). The ships closest to the PENNSYLVANIA which proceeded toward her for the purpose of rescue sustained no substantial damage (Exhibit 135, page 44; Exhibit 123, pages 30 and 31; Exhibit 146(8), pages 47 and 48; Exhibit 47, pages 51 and 52; and R. 1658) and no vessel within the storm area other than the PENNSYLVANIA was lost.

ARGUMENT.

I.

THE PROXIMATE CAUSE OF THE LOSS OF THE PENNSYLVANIA WAS HER UNSEAWORTHINESS AT THE INCEPTION OF HER VOYAGE WHICH WAS WITH THE "PRIVITY AND KNOWLEDGE" OF PETITIONER THROUGH ITS MARINE SUPERINTENDENT VALLET.

The many faults, failures, breakdowns, defects and crack-sensitiveness found by the Court as "factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage"

(Finding V, R. 75, 76) proximately causing the loss of the PENNSYLVANIA with all her crew, personnel aboard and all of her cargo, included the 14-foot crack down the port side between frames 93 and 94, failure or breakdown of the steering systems, inability to steer for a time by any method in heavy seas, cargo adrift taking off tarpaulins on the forward hatches with the No. 2 hatch open and full of water. These faults, failures, breakdowns and defects are positively shown by the tragic radio messages from the master of the vessel and cannot be disputed. It is plainly apparent that they were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented the PENNSYLVANIA from meeting the expected and anticipated weather conditions (Finding V, R. 75, 76).

The error of the District Court in finding, in paragraph VI of its findings, that the unseaworthy condition of the PENNSYLVANIA at the inception of her voyage was without the privity and knowledge of the Petitioner lies in the fact that the Court failed to apply the admiralty doctrines of this and other Courts, holding that the Marine Superintendent, to whom the corporate owner had delegated the operation, manning, inspection and repairs of the vessel, was the alter ego of the owner, whose knowledge and privity is the knowledge and privity of the owner. (Assignment of Error, Points VI, VII) [*The CHICAGO SILVERPALM* (9th Cir.) 94 F.2d 776, 1937 AMC 1463.]

The alter ego of the Petitioner, according to testimony of Vice President J. R. Dant (R.2624), was its Marine Superintendent Lester A. Vallet, and, naturally, in his absence, Harve Brenneke, his assistant. The knowledge and privity of Vallet was that of Petitioner. He was in charge of the Marine Department "which in addition to the maintenance and repair of the vessel also is charged with the obtaining of personnel and the officers for the ships and maintaining the discipline of the vessels and also supplying and storing the ships." (R.140) He was in "charge of the repairs" and "supervision of what is necessary to be done on the vessels" (R.2623) and "inspection on behalf of (the) corporation." (R.2624). Since none of the corporate directors had any direct part in the operation of Petitioner's vessels (R.2618), Mr. Vallet had a broad scope of authority and did *not* have to receive authorization from the Board of Directors in order to be empowered to make extensive repairs (R.2624). In keeping with these complete powers of supervision and control of this part of Petitioner's business, *i.e.,* "the maintenance and repair of the vessel, the manning of vessels, obtaining crews and officers, the hiring and disciplining of officers and outfitting and stowing the vessels" (R. 241), Mr. Vallet was accurately described by Petitioner's proctor as "in charge of the men, equipment and everything about the ship in fitting it for her voyage." (R. 290).

The fact that the petitioning shipowner is a corporation, already possessing limited liability as a fea-

ture of its corporate structure, and exercising its fictitious personality only through human agents, distinguishes this case from those of individual petitioners. This distinction, extremely important in the limitation cases was clearly indicated by the Supreme Court in *Coryell v. Phipps,* 317 U.S. 406, 410, 1943 AMC 18, 21:

> "A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its liability."

As stated by the Second Circuit in *In Re P. Sanford Ross* (2d Cir. 1913), 204 Fed. 248, 251:

> "The Petitioner is apparently a large corporation having different departments of business, over one of which Campbell was superintendent. . . . While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to the largeness of their authority."

In *The ADMIRAL-CLEVECO,* 154 F. 2d 605, 1946 AMC 933, the Court of Appeals for the Sixth Circuit clearly ennunciated the principles of corporate privity and knowledge through its Marine Superintendent as follows:

> "Where a corporation is the owner of a vessel, the knowledge of the marine superintendent having general control and direction of its business is the knowledge of the corporate owner of the vessel, *Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.,* 1 Cir. 256 Fed. 497, and within the

> section of the statute limiting liability, knowledge means not only personal cognizance but also the means of knowledge of which the owner or superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss unless appropriate means are adopted to prevent it."

It is very clear therefore, from the numerous American and Canadian cases, that a corporation is in privity with the actions, omissions, knowledge and means of knowledge of its Marine Superintendent, such as Mr. Lester A. Vallet, so that "any relevant act or omission of his would be the very action or omission of the Company." *The TRITON-BARANOF,* 1956 AMC 967, 970, (Supreme Court of Canada); *The ADMIRAL-CLEVECO,* supra; *In Re New York Dock Co.,* (2d Cir.) 61 F. 2d 777, 1932 AMC 1492; *The HUGH O'DONNELL* (S.D.N.Y.) 62 F. Supp. 239, 1945 AMC 812; *The VESTRIS,* (S.D.N.Y.) 60 F. 2d 273, 1932 AMC 863; *In Re Great Lakes Transit Corp.* (6th Cir), 81 F. 2d 441, 1946 AMC 267; *In Re Jeremiah Smith & Sons* (2d Cir. 1911), 193 Fed. 395; *Petition of Lakehead Transp. Co., Ltd.* (E.D. Wis.), 49 F. Supp. 929, 1943 AMC 333, affirmed (7th Cir.), 140 F. 2d 491, 1944 AMC 376; *Fort Worth Elevators Co. v. Russell* (1934), 123 Texas 128, 70 S.W. 2d 397. To the same effect is *The LINSEED KING (Kellogg & Sons, Inc. v. Hicks),* 285 U.S. 511, 1932 AMC 503, where the privity and knowledge of the works manager was held the privity and knowledge of the owner. In the following cases limitation of liability was de-

nied by reason of the privity and knowledge of certain employees to whom there was a delegation of authority to act on the part of the owners: *The NEW YORK MARINE No. 10,* (2d Cir), 109 F. 2d 564, 1940 AMC 347, (the agent on the dock, a managerial agent); *The POCONE,* (2d Cir.) 159 F. 2d 661, 1947 AMC 306, (the port engineer who was under both the Traffic Manager and the General Agent); *EDGAR F. CONEY AND TOW* (5th Cir.), 72 F. 2d 490, 1935 AMC 1122, (the marine superintendent); *The EDMUND FANNING* (2d Cir.) 201 F. 2d 281, 1953 AMC 86, (captain supervising stowage for shipowners).

It being established both by the evidence and the law applicable thereto that the knowledge, means of knowledge and privity of Mr. Vallet, the Marine Superintendent, was the privity and knowledge of Petitioner, attention is called on the one hand, to the fact that Petitioner has failed to sustain its burden of proving that none of the many faults, failures, breakdowns, defects and crack sensitiveness of the vessel was within the knowledge or privity of Mr. Vallet [See *The City of Brunswick* (D. Mass.) 6 F. Supp. 597, 1937 AMC 552 and authorities there cited.]

In *The REPUBLIC* (2d Cir. 1894), 61 Fed. 109, it has been very aptly stated by the District Court in 57 Fed. 240 at 243:

> "The barge was owned by a corporation, so it was the duty of this corporation, before dispatching the vessel upon the voyage in question, to know by the examination of some duly-appointed

> officer whether the vessel was in a fit and seaworthy condition for the intended voyage. . . . The petitioners cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put. An owner of a ship cannot be permitted to free himself from an obligation of this character by remaining in ignorance of what it was within his power to know." In affirming the case the Circuit Court said: "A loss is not occasioned without the knowledge or privity of the shipowner, when it arises from his personal neglect to inform himself of the defective condition of his vessel. . . . In the present case the privity or knowledge of the corporation consisted of the negligence of its president, who, by his omission of proper care in his examination of the vessel, failed to discover her defective condition."

On the other hand, attention will be called in the following pages to evidence establishing the knowledge and means of knowledge of Mr. Vallet, the Marine Superintendent, to the crack sensitiveness of the PENNSYLVANIA to cold weather and rough seas, not only by his familiarity with the history of former cracks and defects in the deck and structure of the vessel, but by his personal knowledge of the 1946 reports of the Structure Committee on Welded Ships, which included the report of the sinking of the ESSO MANHATTAN by reason of her crack sensitiveness to cold weather and rough seas. The Court's atten-

tion will also be drawn to Mr. Vallet's knowledge or means of knowledge of the failure to inspect, clean and operate the hand steering gear, and failure to open up the main steering engines at any time. The Court's attention will further be called to Mr. Vallet's knowledge of the improper stowage of the acid cargo on the forward deck, and of the lashing of the heavy crib, and the seven-ton trucks to padeyes on the decks without any inspection for fractures and to the fact that unrepaired fractures under padeyes make the vessel unseaworthy according to Petitioner's own witnesses.

II.

THE PRIVITY AND KNOWLEDGE OF PETITIONER TO THE UNSEAWORTHINESS OF THE SS PENNSYLVANIA TO MEET THE EXPECTED PERILS ON HER GREAT CIRCLE VOYAGE BY REASON OF HER CRACK-SENSITIVENESS TO THE COLD TEMPERATURES AND ROUGH SEAS OF THE GULF OF ALASKA IS ESTABLISHED BY THE KNOWLEDGE OF ITS MARINE SUPERINTENDENT.

"The crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V * * *" as found by the District Court (Finding V, R. 75) is supported by the testimony of Morgan L. Williams, a metallurgist at the National Bureau of Standards (R. 1868), who tested the sample from the deck of the PENNSYLVANIA which had been forwarded to him for testing by the U. S. Coast Guard. Mr. Williams was "in charge of Project SR-106 on the study of plates which are fractured" (R. 1871) which was

sponsored by the Ship Structure Committee. It is to be noted that no request was made by Petitioner or its Marine Superintendent of the Bureau of Standards or of any metallurgist for a quick test of the samples taken of the deck plate in the vicinity of the 22-foot fracture, and in fact Vallet testified that no request for tests of the steel was made by him (R. 273). Mr. Williams stated (R. 1883) that the tests could have been made by any qualified metallurgist and that "The actual testing could be done in one day. The preparation of the specimens would take probably a week in the average shop. The chemical analysis might take a little longer." From the test made by Mr. Williams, it was shown that the 22-foot crack started from an old fracture by the padeye, which fracture "had been there before the last time it had been painted" (R. 1857). Although the Marine Superintendent knew that the PENNSYLVANIA would be declared unseaworthy by the U. S. Coast Guard if any fractures remained unrepaired (R. 648, 445) and that fractures were discovered around hatches Numbers 2, 3, 4 and 5 which were required to be repaired before the vessel could be passed for seaworthiness, there was no proof offered that the padeye or any other padeyes had been inspected after February of 1951 and prior to Voyage V, although it is apparent that such inspection would have shown the existence of the fracture that spread to 22 feet on Voyage V and constituted a Class 1 casualty.

Mr. Vallet testified (R. 209) that he was familiar with, and had read several times. "The Design

and Methods of Construction of Welded Steel Merchant Vessels" (Exhibit 185). This publication, which was the Final Report of the Board of Investigation convened by order of the Secretary of the Navy, 15 July 1946, contains at least 8 separate references to the ESSO MANHATTAN, related to the breaking apart of that vessel, due to its notch sensitivity, on March 29, 1943. Included in these references to the ESSO MANHATTAN (Exhibit 185, pp. 2, 3, 21, 30, 44, 64, 90 and 112) is a reproduction of the U. S. Coast Guard "Report of Structural Failure of Inspected Vessel" (Exhibit 185, p. 30) for the ESSO MANHATTAN which describes the breaking and states that: "The fracture started in a butt weld between plates A-9 and A-10 at the crown of the deck." (See the reported case, *The ESSO MANHATTAN* (S.D.N.Y.) 121 F. Supp. 770, 1953 A.M.C. 1152.)

The Marine Superintendent's familiarity with the publication together with his extensive experience fully warned him of the vessel's crack sensitiveness to the cold weather and rough seas which would be expected on a voyage through the Gulf of Alaska in January to the Orient. As stated by District Judge Wright, after previously referring to the Report of the Board of Investigation of the Ship Structure Committee (Exhibit 185) in *The ESSO MANHATTAN,* supra: "The fact that the fracture was of the brittle cleavage type shows that the steel plate of the ESSO MANHATTAN was notch sensitive, which means that if a notch or abrupt discontinuity is present in the steel and the steel is below its critical temperature, it

will fracture, beginning in the area of the notch, with the application of far less energy than would normally be required. The critical temperature of steel is that temperature below which it will sustain a brittle cleavage fracture rather than a sheer fracture. It appears that a notch inhibits the plastic flow of the steel by concentrating the stress in the area of the notch with the result that when pressure is applied to notch sensitive steel below its critical temperature, it will tend to break rather than bend." It is to be noted that the crack reported by the radiogram from the vessel is described as 14 feet extending down into the engine room between Frames 93 and 94 (R. 221) starting in a butt weld and that the fracture of the ESSO MANHATTAN also started in a butt weld. There is no indication from the PENNSYLVANIA as to whether there were other fractures of the vessel forward which was causing the forward hold to fill with water forcing the vessel down by the head, as the master and crew were unable to "get forward to see where trouble is pumps holding in engine room" (Radiogram 1905GMT). It is apparent however that the reports of the crack sensitiveness of the ESSO MANHATTAN and her ultimate breaking in two pieces by reason of this sensitivity to cold weather was sufficient warning to the Petitioner through its Marine Superintendent to require immediate and exhaustive tests of the steel of the PENNSYLVANIA, which they did not make, and which if made, would undoubtedly have prevented the PENNSYLVANIA from making her Voyage VI via the Gulf of Alaska thus saving the lives of the

master and crew, the vessel herself and her cargo. In sailing the vessel on Voyage VI the Petitioner *knowingly took a calculated risk* which constitutes "privity and knowledge" such as to prevent the limitation of liability under the statute.

The warning and knowledge of what to expect in sailing the crack sensitive PENNSYLVANIA on the Great Circle route was there and the warning, and thus the liability through "privity and knowledge," could not be avoided by depending on regulations or inspections of the Coast Guard or of Marine Surveyors. In the first place the law does not allow the petitioner to so delegate its duties, and in the second place it has not been shown that the Coast Guard or the American Bureau of Shipping or other marine surveyors had the information, notice, and warning given to Vallet of the full history of the fracture condition of the vessel or, of such conditions, as shown in the reports in "The Design and Methods of Construction of Welded Steel Merchant Vessels" of the year 1946 (Exhibit 185).

This situation is clarified by the words of Judge Wolverton in *The NINFA* (D. Ore.), 156 Fed. 512, where he states at page 525:

> "I place but slight value on the surveys of the Italian Consul and Lloyd's surveyors, made before the ship left London, as their duties do not call for that rigid inspection and the application of known tests for the discovery of fault required of the owner for the determination of whether his vessel is seaworthy".

The above words of Judge Wolverton must be considered as applicable in this case where no inspections were made of the padeyes other than those in the immediate vicinity of the 22-foot fracture and no tests made after the 22-foot fracture of the steel by Petitioner to determine the crack sensitiveness of the vessel after the warning given by the experience of the ESSO MANHATTAN especially when sailing the PENNSYLVANIA in the cold weather and rough seas of the Gulf of Alaska. See also: *Bank Line v. Porter* (4th Cir.), 25 F. 2d 843; *The OLANCHO,* 115 F. Supp. 107, 1953 A.M.C. 1040, where the Court said: "* * * her own revelation at sea of her actual unseaworthiness refutes the surveys and inspections * * *"; *The FELTRE* (9th Cir.), 30 F. 2d 62, 1929 A.M.C. 279.

The case of *Compagnie Maritime Francaise v. Meyer* (9th Cir.), 248 F. 881, is also applicable. In that case, where there was a claim for damage to cargo, this Court in holding that the carrier did not sustain the burden of proof to show due diligence to make the vessel seaworthy, stated (p. 885):

> "In the present case the court below was of the opinion that the testimony of the experts who inspected the vessel before her voyage began was not conclusive; that the inspection was general largely visual *and not particularly of the parts which proved defective.* The evidence, we think sustains that conclusion. There is no testimony that any of the inspectors made other than visual examination, except the witness Le Roy, who testified that he sounded with a hammer the ship's

sides, and all accessible rivets, but *that he could not examine all rivets for the reason that* at that date, August 27, 1907, *there was cargo in the hold.*" (Emphasis supplied.)

The warnings to and knowledge and privity of Petitioner's alter ego, Vallet, of the crack sensitiveness of the S.S. PENNSYLVANIA which warnings and knowledge he failed to convey to the doomed master (see *The CHICAGO-SILVERPALM* (9th Cir.), 94 F. 2d 776, 1937 A.M.C. 1427) plainly and unavoidably calls for the reversal of the finding of the District Court that the loss of the PENNSYLVANIA was without the privity and knowledge of Petitioner.

III.

HE PRIVITY AND KNOWLEDGE OF THE PETITIONER TO THE UNSEAWORTHY CONDITION OF THE STEERING GEARS OF THE SS PENNSYLVANIA CULMINATING IN THE INABILITY OF THE VESSEL TO STEER AROSE OUT OF THE KNOWLEDGE OF THE MARINE SUPERINTENDENT THAT THE GEARS HAD NOT BEEN PROPERLY OPENED UP, CLEANED AND INSPECTED.

One of the proximate causes of the sinking of the S PENNSYLVANIA is graphically set forth in the adiogram of January 9th, 1952, stating "1905 GMT * * CANNOT STEER * * * IF WE CANNOT FIX TEERING GEAR WILL REQUIRE ASSISTNCE" (Exhibits 127 and 128).

The evidence shows that the PENNSYLVANIA ad three separate methods of steering, one on the ridge which is the main steering engine, one in the

steering engine room itself called the hand steering, and one on the poop where they have a wheel called the emergency steering gear. The steering was operated by telemotor which is described as follows (R. 678):

> "The telemotor system consists of heavy copper piping from the wheelhouse to the steering engine room. That is filled with a nonfreezing liquid free of air, so that in the wheelhouse, if they want a right rudder, they turn the wheel to the right, and at the same time this ram that works off of your steering wheel builds up a pressure on one side that goes down to your telemotor system in the steering engine room. This in turn—that has a long spring on it. This in turn operates the mechanism between there and the hydraulic system to your rams. And your motor furnishes—there is two sets of motors that actually pump—that works the hydraulic to your rams. But the telemotor is the means between the bridge and the wheelhouse, through that mechanism there, of operating the ram that turns the rudder right or left."

The steering from the poop depends upon the operation of the telemotor, while the hand steering may be done with or without the telemotor in operation (R. 678, 679).

The claimants' contention that the steering engines were faulty was acknowledged by Counsel for Petitioner (R. 658):

> "Mr. Wood. * * * I would like to state to your Honor that it is one of the contentions against us in this case that the steering engine was not good.
>
> The Court. Yes, I recall."

Commander Hamilton of the Coast Guard in testifying concerning the entry in the Annual Inspection Report dated August 8, 1951 (Exhibit 53) on page 12 that the condition of the steering engine and controls was "good", described the tests used to determine their condition as follows (R. 658):

"A. The steering engines are tested dually; that is, by the hull inspector and the boiler inspector when we get ready. When that steering engine is tested the hull inspector goes up in the wheelhouse with one of the mates."

"A. Well, the chief engineer went back with me, and we witnessed—he starts the motor, the one or the other, and when he is ready there is a phone between the steering engine room and the wheelhouse, so I call the wheelhouse and tell the inspector up there, which was Lieutenant Rojeski, to move the rudder hard right or hard left. Then I watch the indicator in the steering engine room, the degrees the rudder turns. When it gets over to 35 degrees either right or left I call back over the phone amidships and then they turn the wheel in the wheelhouse until the rudder is neither right nor left; it is amidships. And then the opposite way. Well, of course I wouldn't remember whether I said right or left. It doesn't matter."

(R. 659 con't):

"Then when the rudder has been turned 35 degrees either right rudder and left rudder, then I ask them, 'Are you in a midship position in the wheelhouse?' and they say, 'Yes.' "

Commander Hamilton further testified that the pumps which operate are not opened up on the annual inspection, but are all opened up on the four year survey (R. 687) and that on the annual survey on his inspection only the operating test was given and the engine was not opened up and the internal parts of it were not inspected (R. 689). Although Petitioner was put on notice that the claimants contended that the steering engines were faulty, there was no evidence of any further tests being given than that described by Commander Hamilton, and this test did not even show that the hand steering gear or the emergency steering were even operationally tested. If they had been so tested it is quite apparent that proof thereof would have been made. Vallet, the Marine Superintendent, was present during this annual inspection and knew of the tests which were and were not made.

From the description given of the steering engines it is apparent that there are numerous valves to be opened and closed and in the event that they are not used or tried out at least periodically, emulsion, rust, water, and foreign matters can collect so as to cause the system to fail. There was no evidence produced as to when the hand steering had been actually operated. From the radiograms it is apparent that all the three steering systems had failed, and that the vessel was rolling in the trough of the waves with the sea pouring into her holds for lack of the use of any one of the three steering systems which failed four days after leaving port.

The opinion of the Second Circuit in the case of *The A.H.F. SEEGER,* 104 F. 2d 167, is applicable to his situation, especially where the Court says at page 168:

> "* * * it is common knowledge that the breaking of machinery as a result of which damage occurs, is not normal. * * * In such a case there is ordinarily fault on the part of the owner in operating a vessel that is not seaworthy and the law casts upon him the burden of showing not only what happened but what was done and what would have been necessary to avert the casualty. The Reichert Line, (2d Cir.) 64 F. 2d 13; Cranberry Creek Coal Co. v. Red Star Towing and Transportation Co. (2d Cir.) 33 F. 2d 272; In re Reichert Towing Line (2d Cir.) 251 F. 214, 217."

The Second Circuit in its previous holding *In Re Reichert Towing Line,* 251 Fed. 214, at 217, which involved failure of the crank pin of the crank shaft in the engine, in words so applicable to the instant appeal said:

> "Although the Reichert Company has been held liable for negligence, it will not be liable beyond the value of the tug, if it was without knowledge or privity of the insufficiency of the crank pin. The burden of proving this is on it. Its officers knew of the prior breaking of a steel crank pin of the same size, and no sufficient explanation of that accident is given. They do not show whether they knew the size of the pin, or whether they knew the prevailing practice as to the size of such pins, nor whether, if they did, they made any inquiry whatever as to what the

requirements of such crank pins should be, in view of the prevailing practice of employing a much stronger one. Although the boat had been inspected by the United States local inspectors some three or four months before the accident, and the owners employed an engineer to supervise their equipment from time to time, we do not think that they have discharged the burden of proving their want of knowledge or privity.

The decrees are reversed, and the court below is directed to enter a decree in the limitation proceeding, denying the petition, with costs, * * *"

The Fifth Circuit, in the case of *IONIAN PIONEER,* 236 F.2d 78, 1956 A.M.C. 1750, had before it a claim for cargo damage resulting from the stranding of the vessel, the lower court finding that the stranding was due to unseaworthy steering apparatus, that the owner did not exercise due diligence to make the vessel seaworthy and was not entitled to exemption under the exculpatory clauses of the charter party. In affirming, the Fifth Circuit so appropriately says:

"The libelant has never shirked its burden. *Commercial Molasses Corp. v. New York Tank Barge Corp.,* 314 U.S. 104, 1941 A.M.C. 1697, of affirmatively establishing a case under the contract of private carriage which warranted, at least, due diligence to make the vessel seaworthy, and by reflex, from this and the catch-all exculpatory clause so tenderly embraced by shipowner, imposed liability where the stated exception was not made out. *ZESTA* (5 Cir.), 1954 A.M.C. 899, 212 F. (2d) 137; *FRAMLINGTON COURT* (5 Cir.) 1934 A.M.C. 272, 69 F. (2d) 300.

It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted 'loss or damage arising or resulting from' (1) navigational error, (2) stranding or (4) latent defect, 6) any other cause without actual fault or privity, *Folmina,* 213 U.S. 354 and certainly not if these were merely concurring causes. *Compania de Navigacion La Flecha v. Brauer,* 168 U.S. 104, 118; *Olga S.* (5 Cir.), 1928 A.M.C. 831, 25 F. (2d) 229.

"In this task, while ultimate risk of non-persuasion may have been on the cargo, it had the usual advantages of a bailor putting on the carrier, as the person having the means of knowledge, the obligation of coming forward with some explanation, *Commercial Molasses Corp. v. N. Y. Tank Barge Corp., supra; Northern Belle,* 76 U.S. 526; *Southern Ry. v. Prescott,* 240 U.S. 632, and a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail shortly after the beginning of the voyage without accident, stress of weather, or the like, furnishing an adequate explanation as a likely cause. *Southwark,* 191 U.S. 1, *Olancho* (S.D.N.Y.), 1953 A.M.C. 1040, 115 F. Supp. 107; *Agwimoon* (D.C.Md.), 1928 A.M.C. 645, 24 F. (2d) 864, aff'r. (4 Cir.), 1929 A.M.C. 570, 31 F. (2d) 1006.

* * * * * * *

. . . "Was the unseaworthiness caused by the owner's failure to exercise due diligence? On this the only serious concern is whether the shipowner ought to have known of these defects because, save for diligence in obtaining certificates of sea-

worthiness from Helenic or Lloyds classification societies and which is certainly not the test, see *KNAUTH,* supra, page 187; Abbazia (S.D.N.Y.), 127 Fed. 495; *Poleric* (4 Cir.), 1928 A.M.C. 761, 25 F. (2d) 843, cert. den. 278 U.S. 623; *Edgar F. Coney,* (5 Cir.), 1934 A.M.C. 1122, 1129, 72 F. (2d) 490; and a few superficial repairs to parts of the steering apparatus, the last of which for the engine was July 12, 1951, and for the telemotor, January 31, 1950, the *record is completely silent of any serious inspection and survey of the entire steering machinery before this charter party voyage began.*" (Italics supplied.)

In the presence of Marine Superintendent Vallet, the last inspection given to the steering engines, [except when the shaft of the emergency steering gear was, in November 1951, freed of clothing (part of the cargo in No. 5 hold) which had shifted around the shaft of the emergency gear preventing its operation], was in August 1951 at the Annual Inspection, some five months prior to the sailing of the PENNSYLVANIA on her fateful voyage on January 5, 1952. At this Annual Inspection, Commander Hamilton and Lieutenant Rojeski of the Coast Guard gave the steering engine a mere operating test (R. 688) Commander Hamilton testifying (R. 688, 689):

"Q. When you inspected this steering engine on the Pennsylvania during your annual inspection, you told us that that was an operating test?

"A. Of the Steering engine?

"Q. Yes.

"A. That is right.

"Q. You watched it operate.

"A. That is correct.

"Q. And the engine was not opened up, and the internal parts of it were not inspected at that time?

"A. No, sir."

In the case of *The MEANTICUT-BEDFORD,* 65 F. Supp. 203, 1946 A.M.C. 178, the court had before it for decision a collision occurring when the steering gear jammed by reason of a short circuit in the electric wiring controls. In holding that a "routine operating test of the steering gear" was not sufficient to sustain the burden of inevitable accident defense, a latent defect, the Court said:

> "In addition to the survey by Lloyd's in January, 1940 [referred to above] there is a Lloyd's report dated July 20, 1941 of a survey and another report dated February 28, 1942 of one made on January 7, 1942, in both of which the 'steering gear and its connections' were reported 'Good.' However, MacCorkindale, Lloyd's representative who made the last two surveys, testified that no megger test nor electrical equipment examination was made on either of these surveys. Lloyd's inspections in 1941 and 1942 apparently were not full surveys, for although reports state the steering gear was examined, no electrical equipment was tested. In any event certificates of surveyors and inspectors are to be valued in the light of the actual facts disclosed. *The Doris Kellogg,* 1937 A.M.C. 254, 18 F. Supp. 159.
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> * * * * * * *
>
> "According to the *Bedford's* deck log and the testimony of her Third Officer, a routine oper-

> ating test of the steering gear was made on the morning of April 9, before sailing from the Bayonne and it was reported 'in good order.' The test consisted of repeatedly turning the wheel and watching the indicator."

The radio messages from the PENNSYLVANIA supply the evidence of the failure of the steering gear which was held to be lacking in *The IOWA,* (D.C. Ore.), 34 F. Supp. 843, where this same petitioner successfully obtained limitation of liability even though the IOWA was held unseaworthy and it was denied exoneration. In *The IOWA,* supra, Judge Fee held:

> "The petitioner bore the burden imposed by The Denali (Pacific Coast Coal Company v. Alaska Steamship Co., 9 Cir., 105 F. 2d 413 supra). It was proved that the *IOWA's* 'loss was not occasioned by any lack of seaworthiness' and that 'there was in fact no causal connection between the failure to install such a communication system and the loss of the ship'. The evidence upon which this finding is based indicates that the ship had been operated from Portland to Astoria by her main steering gear. The presumption in the absence of evidence is that the main steering gear was still in use at the moment of the strand. The behavior of the ship immediately prior to stranding and her radio messages indicate that no steering gear, however efficient, would have saved her."

The graphic words of the radiogram of January 9, "1905 GMT TAKING WATER NO. ONE HOLD DOWN BY HEAD CANNOT STEER * * * IF WE

CANNOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE * * *" supply the evidence which was so lacking in the IOWA, supra. The lack of inspection, cleaning and, if necessary, repairing, the steering system condemn the PENNSYLVANIA for unseaworthiness and the petitioner for knowledge and privity of such unseaworthiness which unquestionably calls for reversal of the District Court on the question of knowledge and privity and for the denial of limitation.

IV.

THE VIOLATION OF THE LAW REQUIRING SECURITY OF HATCHES AND THE IMPROPER CARRIAGE AND STOWAGE OF DECK CARGO WAS AN UNSEAWORTHY CONDITION PROXIMATELY CONTRIBUTING TO THE LOSS OF THE PENNSYLVANIA AND WAS WITH THE PRIVITY AND KNOWLEDGE OF THE PETITIONER.

The PENNSYLVANIA was carrying bulk grain and the securing of the hatches was not only of extraordinary importance but suitable hatch securing devices, in good condition, were specifically required by law. See Title 46, Code of Federal Regulations, Sec. 144.10-80, which reads as follows:

> "Security of Hatches. (a) Vessels carrying loose grain in bulk shall have suitable means of securing hatchways and other weather deck openings. Hatch covers and their supports shall be in good condition and properly battened down using good and sufficient tarpaulin, cleats and wedges where necessary.

The condition of the cargo, its stowage, bunkering and securing of the hatches was directly under the supervision of Marine Superintendent Vallet, as he stated (R. 284):

> "A. When the vessel is loaded and properly stowed and bunkered, we advise the master to that effect, and we leave it up to him when he should leave."

The petitioner had the burden of proving compliance with the statute, Title 46, Code of Federal Regulations, Sec. 144.10-80, with respect to the securing of hatches which burden it failed to discharge. On the other hand, it is shown by the record that the petitioner failed to inspect and repair the battens and hatch securing devices and it appearing directly from the radio messages from the PENNSYLVANIA that water was entering the No. 1 and No. 2 holds and drifting cargo was taking the tarpaulins off the forward hatch, there is left little question that the statutory fault directly and proximately contributed to the cause of the disaster and sinking of the PENNSYLVANIA and was within the privity and knowledge of Marine Superintendent Vallet. Under these circumstances the PENNSYLVANIA Rule, applied in the case of *The PENNSYLVANIA,* 19 Wall. 125, 22 L.ed. 148, is directly applicable here. The Rule as stated by the Ninth Circuit in *The DENALI,* 105 F. 2d 413, is:

> "As this court, in reviewing and summarizing the cases, has said concerning this extraordinary burden of proof on violators of statutes governing

vessels and their navigation and management, 'Failure to obey a statute does, indeed, penalize the violator. The penalty, however, is not that the violator is to be held accountable for any mishap, regardless of its relation to the violation. The rule simply is that the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so. *This burden it is frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and therein lies the true penalty imposed upon him.*' (Emphasis supplied.) The Princess Sophia, 9 Cir., 61 F.2d 339, 347."

The Petitioner arranged to carry the bulk grain in the lower hold of the vessel. Bulk grain is considered a dangerous cargo. (See deposition of Captain Bissett, Grain Warden for the Port of Vancouver (R. 802). In the carriage of this grain cargo, it was necessary to secure the bilge strainers with burlap (see testimony of foreman in charge of grain fittings, Neal McIver, R. 2638), and according to the testimony of Petitioner's own witness, a cargo surveyor, Alden Johnson, there would be practically no way of pumping out water if it once got into the cargo hold (R. 1220).

The uncontroverted testimony of three members of the PENNSYLVANIA's crew for Voyage V establishes that the cross battens on the forward hatches were bent and buckled in such a manner as to make them difficult to secure and difficult to keep secured at sea. See testimony of Alvin Huston, ship's car-

penter (R. 2081), Richard S. Brooks, ordinary seaman (R. 2094 and 2095), and Royce Cornwell, ordinary seaman (R. 2100 and 2101).

Captain Harry Johnson testified that a Victory ship sailing for a North Pacific voyage in January with cross battens that are in a bent condition so that they were difficult to secure and difficult to keep secure, would be unseaworthy and he would not go to sea with a ship under those conditions (R. 2434). Mr. Gilmour testified to the same effect (R. 2301).

The Petitioner was unable to rebut this testimony as to the condition of cross battens. Although it is established that a deckload of heavy timbers came loose and drifted around the forward deck of the vessel on Voyage V (R. 2095), there is no indication in the record that any inspection of the cross battens or other hatch fittings was made subsequent to that occurrence. Petitioner's only evidence in that regard was by Mr. Matthews, who testified at page 2830 of the record that it is the function of the engine department to repair cross battens and he received no request to make such repairs on the PENNSYLVANIA and never did repair any.

From past experience in the operation of this very vessel this company knew the danger of carriage of cargo or equipment on deck. On Voyage I, a spare propeller stowed on deck broke loose (R. 159), and was lost "overboard in a storm". On Voyage II, a reel of wire broke loose and cut through four tarpaulins on No. 2 hatch (R. 189, 190) which, Mr. Vallet stated, was "ordinary heavy weather damage" and

that "we have heavy weather damage on practically all the voyages". On Voyage IV, an acid cargo box came adrift causing damage (R. 190), the deck log reading: "Shipped over starboard after deck tearing acid cargo box adrift and damage forward starboard No. 4 boom rest; cargo shifting." On Voyage V, the deckload fore and aft got loose and was shifting (R. 190). According to the testimony of Petitioner's own cargo surveyors, heavy seas can tear off even a seaworthy deckload (R. 1231), and Richard A. Johnson, cargo surveyor, admitted (R. 1750), that it would be more dangerous to a vessel to sail with a deckload than without it, and he also stated that a deckload, once it breaks loose and is drifting around on deck, is dangerous (R. 1751). Petitioner also knew that heavy seas and rough weather were to be anticipated in the North Pacific at this time of year. As to the measure of duty of Petitioner, it is interesting to note the rule stated by Judge Learned Hand in *The POCONE* (2d Cir., 1947) 159 F.2d 661, 1947 A.M.C. 306, at 311.

There can be no possible argument that the carriage of deck cargo was a decision of any party other than the States Steamship Company. Mr. Pitzer, the head of the Operating Department, in charge of all cargo operations with States Steamship Company, testified that he advised the Army what space was available for their cargo for Voyage VI (R. 2775). Mr. Maurice, the Army Preplanner, testified that the entire deck space of the vessel was made available to the Army by the operators of the vessel (R. 2130). It is significant

that the testimony does not disclose that any of the other vessels which engaged in the rescue operations in this storm carried any deck cargo and none of them lost their hatch covers. See testimony of Captain Brown of the CYGNET III (R. 1677).

The decision of the Second Circuit in the case of *The WEST KEBAR,* 147 F.2d 363, 1945 A.M.C. 191, seems particularly applicable under its facts to the instant case. There the Court had under consideration a claim for cargo damage occurring on an Atlantic crossing. Cylinders of ammonia stowed on deck broke loose, plunged about the deck, broke off "kick tubes" and permitted sea water to enter 'tween decks in Nos. 4 and 5 holds causing damage to cargo stowed therein. In holding that the vessel was unseaworthy with respect to her deck cargo and denying the defense of Peril of the Sea, the Court appropriately says:

> "The first question is whether the ship was unseaworthy. Arguendo, we will assume that the 'kick tubes' did not make her so if she had carried no deck cargo; and, perhaps also, even when she carried certain kinds of deck cargo. Indeed, we might go still further, and assume that she was seaworthy, just as she rode, for a summer voyage, for example in the Mediterranean. But she was to cross the Atlantic in January, ending in latitudes over 40°; and the question is whether, with the deck cargo she actually did carry and the 'kick tubes' in her deck, she was reasonably fitted for such a voyage. The Silvia, 171 U.S. 462, 464; The Southwark, 191 U.S. 1, 9; Societa Anonima, etc. v. Federal Insurance Co., 1933 A.M.C. 323, 62 F.(2d) 769, 771 (2CCA); The

Smyrna, 1933 A.M.C. 231, 63 F.(2d) 1048, 1050 (4CCA); The J. L. Luckenbach, 1933 A.M.C. 980, 65 F.(2d) 570, 572 (2CCA); The Galileo, 1932 A.M.C. 1, 54 F.(2d) 913, 914 (2CCA). The fact that the 'kick tubes' had caused no trouble in the past was relevant, but far from conclusive; it took only a minimum of foresight to perceive that they would stand up against very little violence. True, as they were placed on the deck, they were out of the way; set either close to the bulkhead, alongside the hatch coamings, or around the mast. It would take a direct hit to break them off; but it would not take a heavy hit, and each one, if broken, would open a hole over an inch in diameter directly into the 'tween deck. An ammonia cylinder, weighing 200 pounds, free to plunge about on an open deck in a heavy seaway, was an engine before which such a fragile obstacle was no better than an eggshell. The safety of the cargo stowed below deck was therefore absolutely dependent upon the continued solidity of the pack; and, in the way the cylinders were made fast, that solidity depended upon each one's keeping its position in the pyramidal stack. As soon as one slipped out from between its fellows, the hold of the rest upon each other was lost, and all would inevitably escape. There were the nets, to be sure, but these did not go clear to the deck, and could not be expected to hold if they had, once the pack broke up.

"The consequences of any such break being so great, the least care that could be demanded was that the cylinders should be made fast against all but the most unexpected and 'catastrophic' storms; and such care the ship did not in fact bestow as the event proved. During the watch be-

tween 4 a.m. and 8 a.m. on January 11, the West Kebar's log records a wind force of 8 on the Beaufort Scale—39 to 46 miles—and for the watch from 8 a.m. to 12 m., '9-10'. Nine is a 'strong gale'—47 to 54 miles—; 10 is a 'whole gale' 55 to 63 miles. . . . * * *

"The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season. We cannot therefore agree that 'the damage to the cargo in the shelter or bridge decks, and the No. 5 'tween-deck and No. 5 lower hold was due to perils of the sea,' as the judge found. On the contrary, we are forced to conclude that the West Kebar is liable for entry of all sea water that she shipped on the after well deck."

Although the experience of the Petitioner in the carrying of deck cargo on previous voyages had resulted in heavy weather damage when crossing the North Pacific, the Petitioner decided to carry the Army corrosive acid cargo, refusing to stow this cargo aft by the No. 4 or 5 hatches, as requested by the Army, the master requiring that it be stowed forward near the No. 2 hatch. When the vessel sailed on its voyage in January 1952 via the Great Circle route with the expected gales and seas at that time of year with the cargo of white label corrosive acid on the forward deck, the PENNSYLVANIA was, like the

WEST KEBAR, unseaworthy in that she did not successfully meet the weather thus expected, and such unseaworthiness was with the privity and knowledge of the Petitioner as shown by the testimony of its Marine Superintendent Vallet who testified (R. 284), "When the vessel is loaded and properly stowed and bunkered, we advise the Master to that effect and we leave it up to him when he should leave. Q. Even though there was a hurricane existing at the time? A. Yes. * * *" Mr. Gilmore, an experienced Marine Surveyor with both extensive sea and shore experience, testified that the "PENNSYLVANIA was not seaworthy for a voyage across the North Pacific with acid stowed forward by the No. 2 hatch (R. 2339).

It just seems inconceivable that with the past experience of the deck cargo coming adrift and damaging hatch covers, that the acid cargo was carried on the forward deck with the knowledge and therefore the privity of the Petitioner. The liability of the Petitioner for the improper stowage of the cargo under such circumstances is held in *The SEGURANCA* (5 Cir.) 250 Fed. 19 and *The THAMES* (4 Cir.) 61 Fed. 1014. It is well established that stowage of articles which, if they come loose will imperil the safety of the ship, is one of the aspects of seaworthiness. *The INDIEN* (S.D. Cal.) 5 F.Supp. 349, 1933 A.M.C. 1342, aff'd (9 Cir.) 71 F.2d 752.

CONCLUSION.

The loss of the PENNSYLVANIA with her master, all of her crew, and cargo, presents herein questions for decision of this Court which will have great bearing upon the safety and protection at sea of the lives and property of American citizens. The tragedy of the PENNSYLVANIA is almost unparalleled in the North Pacific history of shipping, as there were no living survivors to tell of the causes of this great tragedy and no remnants of the vessel, not even a lifeboat, was ever sighted. It must be conceded by all parties that the evidence contained in the radio messages from the master of the vessel, sent immediately prior to the time of the death of himself and his crew, are, to the extent that they describe the immediate causes of the casualty and existing conditions, conclusive even against any opinion of experts who may have given testimony contrary thereto.

The findings of the District Court of the many faults, failures, breakdowns and defects (Findings IV and V) and that the storm in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered being of the kind to have been expected in January, and that the sole and proximate cause of the sinking of the PENNSYLVANIA was her own unseaworthiness, were amply supported—not only by the radiograms from the master of the ship but by the testimony and exhibits introduced in evidence.

The District Court erred, however, in failing to recognize that the Petitioner, in producing its evi-

dence, clearly proved and practically admitted that its Marine Superintendent Lester Vallet was the alter ego of Petitioner, having full charge of not only the operation of the PENNSYLVANIA, but also of the manning, repairs and upkeep of the ship. In other words, the "largeness" of his delegated authority unquestionably makes his knowledge and privity that of the Petitioner. All of the faults, failures, breakdowns and defects in the history of the vessel prior to the time Marine Superintendent Vallet sailed the vessel from Seattle through the cold temperatures and rough seas of the Gulf of Alaska were known to him including the available information of the expected perils on the voyage, which the PENNSYLVANIA could not be expected to and did not successfully meet.

The record in this case supplies the very evidence that was lacking in *The IOWA,* supra, in which latter case the Petitioner was denied exoneration but granted limitation because it was not shown that the steering gear on the *IOWA,* or the proper communication system between the bridge and the engine room, were not in fact operating. The graphic messages of the Master that the PENNSYLVANIA "CANNOT STEER * * * IF WE CANNOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE" show the results of Petitioner's failure to thoroughly inspect the three steering systems, none of which were working, and neglect to make such repairs as would have insured against such failure. It may be likened to

sending a truck out on the freeway without checking the steering mechanism. It is apparent that the failure of the steering gears prohibited the master from keeping the PENNSYLVANIA's bow up into the waves and, for lack of steering, the vessel wallowed in the trough, broadside to, taking the full crest of the waves and green water with tremendous force on its decks. Marine Superintendent Vallet knew or was charged with knowledge of the crack-sensitivity of the vessel to cold temperatures and rough seas and he was charged with the knowledge which was available to him that on its voyage from Seattle to the Orient, the vessel would, in the Gulf of Alaska during the month of January encounter these conditions which proved so fatal to the PENNSYLVANIA. Furthermore, Vallet was fully charged with the responsibility for failure to open up the three steering systems, and to clean, inspect and make such repairs as might be necessary to insure the operation of this essential machinery. Instead of complying with the law as set forth in the various decisions of the Courts, he ignored his duties and attempted to escape responsibility for the loss of the vessel by relying on certificates of inspectors whom he personally knew did not have the information which he, Vallet, personally had. Furthermore, Vallet did not even inform the master of the PENNSYLVANIA that the vessel was crack-sensitive to cold temperatures and rough seas, which he knew or should have known from reading the reports of the Committee on Welded

Ships. (Exhibit 185), especially from reports concerning crack-sensitiveness of the ESSO MANHATTAN.

The Statutes passed for the safety and protection of life and property at sea with respect to the securing of hatches when bulk grain is carried were also violated as it was shown that the battens securing the hatches were broken and bent. Although it has not been fully argued, the Court's attention is called to the fact that although Vallet was charged with the proper manning of the vessel the Petitioner's own casualty department reported (Exhibit 24) that only 5 able bodied seamen were aboard the PENNSYLVANIA when the law required 6 able bodied seamen, and the record is not fully clear (R. 257) as to why such a report was made if, in fact, there were 6 able bodied seamen instead of 5 as reported.

It is respectfully submitted that the record in this case is so full of evidence showing the privity and knowledge of the Petitioner, through its Marine Superintendent Vallet, of the many faults, failures, breakdowns and defects of the PENNSYLVANIA, her crack-sensitivity to cold temperatures and rough seas and violation of law, that the District Court's finding and holding that the cause of the loss of the PENNSYLVANIA, her unseaworthiness at the inception of her voyage, was not with the privity and knowledge of the Petitioner and that Petitioner is entitled to limit its liability to the pending freight

should be reversed and decree entered against Petitioner in favor of the cargo claimants in the full amount of their loss.

Dated, January 4, 1957.

Respectfully submitted,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

LEAVENWORTH COLBY,

KEITH R. FERGUSON,
Attorneys, Admiralty and Shipping Section,
Department of Justice,

Attorneys for Appellant
United States of America.

KENNETH E. KULZICK,
Of Counsel.